SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 855

ANTOINE BROUSSARD

versus

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT.

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To the Chief Justice of the United States and the Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Louisiana entered on October 5, 1966, and inasmuch as same merely refused to grant an application for certiorari and/or writ of review to the Louisiana Court of Appeal for the Third Circuit, the writ herein requested must necessarily relate to the judgment of said Court of Appeal rendered on June 2, 1966, and to the denial by that Court of the application for rehearing. All proceedings in the Louisiana courts were timely taken.

Petitioner, passenger in an automobile, sustained serious head injuries when that vehicle collided with a

truck. Louisiana has no guest passenger statute, but has a direct action statute, so petitioner sued the insurer of the owner and driver of the automobile in which he was a passenger. Asserting his right to recover under the public liability portion of defendant's policy, petitioner alleged negligence on the part of the insured. Alternatively, in the event it were found that the insured had not been negligent, petitioner sought to recover under the "uninsured motorist" provision of defendant's policy, asserting that the driver of the truck was not covered by public liability insurance.

Louisiana law provides for trial by jury in civil cases, and petitioner prayed for a jury trial. The issue was submitted to the jury on special interrogatories, and the jury, in answering same, found defendant's insured to have been free of negligence, and the operator of the truck to have been covered by public liability insurance, and the trial court then rendered judgment dismissing plaintiff's suit.

On appeal to the Louisiana Court of Appeal for the Third Circuit, that Court categorically found the trial court to have been guilty of prejudicial error in the exclusion and in the admission of certain evidence, and that these serious errors related directly to the jury's findings with respect to aforesaid special interrogatories, the appellate court then stating that, because of such errors, the verdict of the jury could not be accorded its usual importance.

Said appellate court then reviewed the record, and purporting to find that same disclosed factual basis for denying plaintiff's alternative claims, merely affirmed the judgment of the trial court, without remanding for new trial. In doing so, this appellate court conceded that this was contrary to common law, but pointed to the Louisiana

constitutional provision permitting appellate review of facts. Also admitting the Louisiana rule to be that the jury verdict could be disturbed only for "manifest error", although also holding this rule to be inapplicable because of the serious and prejudicial errors of the trial court, the appellate court nevertheless refused to remand the case, and to give plaintiff an opportunity to obtain a jury verdict which then could have been reversed only for "manifest error", even if the common law rules of appellate review are not applicable in Louisiana.

On application for rehearing, plaintiff asserted the Louisiana constitutional and statutory grant of right to civil jury trial, that the appellate decision had denied him jury trial, depriving him of constitutional due process and equal protection secured to him by the Fourteenth Amendment to the United States Constitution. Further in this connection, he asserted:

> Plaintiff's right therefore to an adjudication of the facts in this case by the jury constitutes right of due process secured by the Fourteenth Amendment to the Constitution of the United States. *Turner v. State of Louisiana*, 379 U.S. 466, 85 S. Ct. 546. By the denial of that right by this Court substituting its judgment of the facts for that jury, where through prejudicial error, the jury was not permitted to adjudicate these facts, plaintiff was denied of a jury trial and of constitutional due process. The decision of this Court therefore is an abnegation of its obligation to guard and enforce every right secured by the Constitution of the United States * * *.
>
> The decision of this Honorable Court further denies plaintiff of equal protection and due process secured to him by the Fourteenth Amendment to the United States Constitution in that plaintiff was

> denied of the rule applicable to all appellants in respect to findings of fact of lower courts to the effect that such findings will not be disturbed absent manifest error. * * * The decision of this Honorable Court further denied plaintiff of demeanor evidence, and * * * further infringes plaintiff's constitutional rights.

In brief on appeal to that Court, and in application for rehearing, petitioner made it plain that reference to Amendment Fourteen included the effect of that amendment upon Amendments Five and Seven.

Rehearing was denied without comment, and application to the Louisiana Supreme Court for writ of review was also denied.

OPINIONS BELOW

The entire opinion of the Louisiana Court of Appeal is reproduced in Appendix A. It contained, however, the following language:

> **1. Independent appellate review of facts.**
>
> The case was submitted to the trial jury upon special verdicts requiring a special written finding by the jury upon each issue of fact, LSA-CCP Art. 1811, as requested by the plaintiff. For the reasons to be stated below, we think that prejudicial error was committed in the exclusion and in the admission of certain evidence.
>
> We are thus unable to accord the usual weight to the jury verdict. Such findings by the trier of fact are on review usually accepted in the absence of manifest error; this usual rule cannot apply where there is a reasonable possibility that the trial jury's finding was incorrectly based due to prejudicial rulings incorrectly excluding or admitting evidence by reason of which the jury might have reached a contrary verdict.

> In common law states, upon finding prejudicial ruling as to evidence, the case would ordinarily be remanded for new trial. This is not the rule in Louisiana. * * *
>
> After reviewing the entire record, * * * we have concluded that the preponderance of the evidence supports the jury's special verdicts and that the trial court's judgment should therefore be affirmed. * * *

The appellate court having ruled that the trial court had committed prejudicial error in permitting plaintiff to be questioned about a compromise entered into by him with the driver and the owner of the truck, and an insurance company which had denied coverage as to them, pointing out that the sole purpose this evidence had been offered by defendant was to show that plaintiff had received some money, and that, as stated by defendant's counsel to the jury, the other insurance company would not have paid if the truck driver had been uninsured, then referred to a written compromise agreement entered into some days after the conclusion of the trial, and drew from this agreement the same inference of insurance that had been drawn by the jury when evidence of the verbal agreement of compromise had been erroneously presented to it. (*Broussard v. State Farm Mutual Automobile Insurance Co.*, 188 So. (2d) 111)

Rehearing was denied without any comment.

On application to the Louisiana Supreme Court for writ of certiorari and/or review, that Court on October 5, 1966 denied same, as follows:

> Writ refused. On the facts found by the Court of Appeal, the result is correct.

Thus, the Louisiana Supreme Court necessarily approved appellate review of facts, even to the extent that same deprived plaintiff of any determination by the jury, but abrogated its own right to review such facts, accepting those as found by the Court of Appeal.

JURISDICTION

Jurisdiction is envoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

1. When a State has granted civil jury trial, and when an appellate court finds that a verdict adverse to plaintiff resulted from several serious and prejudicial errors of law committed by the trial court in the admission and in the exclusion of certain evidence bearing directly upon the special issues determined by the jury, is the plaintiff then deprived of due process of law and of equal justice, as well as the right to trial by jury, under Amendments Five, Seven and Fourteen of the United States Constitution, when the appellate court then reviews the record and, although finding substantial evidence that would have justified a jury verdict favorable to plaintiff, interprets the evidence as a whole as preponderating in favor of defendant, and, despite the finding of seriously prejudicial errors of law committed by the trial court, affirms the judgment of the trial court, declining to remand the case for new trial before a jury?

2. Is such procedure violative of the due process and equal justice provision of Amendment Fourteen of the United States Constitution?

3. Has Amendment Fourteen made applicable to State Court proceedings the due process requirement of

Amendment Five and/or one or both requirements of Amendment Seven?

4. Under State law which grants trial by jury in civil cases, may a plaintiff who has obtained such trial be deprived by appellate interpretation and review of facts of his right to have the facts initially determined by the jury upon all evidence properly admissible, and no other, in order that any verdict which the jury might return in his favor, if based upon substantial evidence, could not be reversed on appellate interpretation of facts, at least in the absence of manifest error on the part of the jury?

STATE LAWS INVOLVED

Article 7, Section 29, of the Louisiana Constitution provides that appellate review in civil cases is "on both the law and the facts". Article 7, Section 41, provides, "The Legislature shall provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases * * *."

Trial by jury has statutory recognition in Articles 1731-1814 of the Louisiana Code of Civil Procedure, the pertinent articles being reproduced herein in Appendix B.

CONCISE STATEMENT OF THE CASE

Plaintiff and one Knott, residents of Louisiana, were employed in Texas, and in the dark of an early morning hour, were proceeding from their home to their place of work in Knott's automobile, plaintiff being a front seat passenger, sometimes awake and sometimes dozing. As they proceeded along the highway, they encountered patches of fog, these becoming progressively thicker and longer.

Several days earlier, one Vernon, living in West Texas, had purchased a large truck and trailer which before his purchase had been insured through its former owners with National Indemnity, through a local insurance salesman named Davenport, whose deposition on oral examination was received in evidence, and who had testified that Vernon had made verbal request of him for insurance coverage, that he had then placed a telephone call to a general insurance agent in another city, which was the general agent for several insurance companies, that he had never told Vernon the truck was covered, that no binder ever issued, that he had no authority to bind any insurer, that no policy ever issued respecting that truck, that a week or so after the accident here in question, Vernon traded the truck for another, and made application through Davenport for insurance coverage, after which a policy did issue from National Indemnity covering the newly-acquired truck. The former owner of the truck, Smith, testified that he specifically told Vernon that his own insurance coverage would end with the transfer of ownership.

Said truck, being operated by one Martin, employee of Vernon, was proceeding along the same Louisiana highway, in the opposite direction from that being followed by the Knott automobile, and the two vehicles entered from opposite directions a long area of heavy fog. Martin, believing it dangerous to continue, began to look for a place to leave the highway, and seeing lights of an establishment on his left, gave appropriate blinker signal of his intention, and began slowly to turn left, off the highway, and all of his vehicle had been removed from the highway, except the last few feet of the rear of the trailer which still extended into that part of the highway in which the Knott automobile was travelling, when the Knott automobile collided violently with said rear portion of the trailer, with

such force that plaintiff was hurled forward and received serious injuries, including skull fracture and brain damage, which thereafter resulted in a progressive loss of memory.

Alleging combined or concurrent negligence on the part of both drivers, plaintiff sued Martin, Vernon, National Indemnity and State Farm, the latter insurer being the carrier for Knott, its policy insuring against public liability, and the policy further containing an "uninsured motorist" provision.

Plaintiff's claim alternatively alleged, with respect to State Farm, that if it be found that Knott was not guilty of any negligence causing or contributing to the accident, plaintiff should be permitted to recover under the "uninsured motorist" provision, whereby State Farm was liable in damages to any occupant of the Knott automobile injured in a collision with a vehicle not covered by public liability insurance, when the accident resulted solely from the fault or negligence of the operator of such other vehicle.

On the morning of trial, plaintiff entered into a verbal agreement whereby he was to receive $15,000.00 from National Indemnity, in return for a restricted release for that insurer, Vernon and Martin, this specifically not to affect his rights as against State Farm.

Under Louisiana Civil Code Article 3071, compromise agreements admit nothing, representing simply a compromise of grievances and claims which the parties thereto prefer to the hope of gaining, balanced by the danger of losing, and no compromise agreement has any effect unless and until it is reduced to writing.

The accident had taken place on October 11, 1963. At the request of defendants, a discovery deposition was taken

of plaintiff in February, 1965, under a stipulation by which the parties waived the necessity of making objections at the time of the deposition, reserving this right until such time as all or any part of the deposition might be sought to be used at time of trial.

By the time this deposition was taken, plaintiff's injuries had resulted in serious loss of memory, and he did not recall much of what had happened at the time of the accident. Among other questions, plaintiff was asked in his deposition, "To your knowledge, was there anything that Mr. Knott could do to keep from hitting that truck?", to which he had answered in the negative. This required plaintiff himself to make a legal evaluation of the conduct of defendant's insured, and could not be required under Louisiana law. *Hebert v. Aetna Casualty Company*, 172 So. (2d) 121.

Trial did not take place until about eight months after this deposition had been given, or about two years after the accident, by which time plaintiff had sustained further loss of memory, and although he recalled having given his deposition earlier, he had no recollection of specific questions or answers, and he had no independent recollection whatever as to how the accident had taken place.

When counsel for State Farm at trial sought to elicit from plaintiff an evaluation of the conduct of its insured, counsel for plaintiff objected. Counsel for defendant then sought to read from the transcript of plaintiff's deposition, given almost a year earlier, that portion in which plaintiff had then been required to express such opinion.

When counsel for plaintiff objected, defendant's counsel stated that the only purpose was for impeachment, and

although plaintiff had testified as to his loss of memory, and the injuries received by him were shown to be such as to be expected to cause such loss, the Court permitted the reading of this and other carefully selected portions of the deposition transcript. Plaintiff's counsel then requested that surrounding portions of the transcript be then read to the jury, which the Court refused to order, and when the cross-examination of plaintiff had been completed, his counsel then offered the entire transcript of said deposition, and the Court refused to permit same to be received.

In this connection, the Louisiana Court of Appeal stated:

> The plaintiff-appellant's complaint is that the excerpts from his discovery deposition introduced at the trial were out of context and that he was entitled to have introduced also those parts relevant to the excerpts admitted, so as to show the latter's correct meaning according to their context. The plaintiff-appellant also contends that he is entitled to have his entire discovery deposition introduced as a result of the defendant-appellee's introduction of part of it. In both of these contentions, the plaintiff Broussard relies upon LSA-CCP Art. 1428, especially 1428 (4), which we will quote in our later discussion below.
>
> Article 1428 (4) requires a party to introduce relevantly connected parts of the deposition along with any excerpts offered, and it also permits any other party to offer other parts or all of the deposition. State Farm, which introduced the excerpts from plaintiff's testimony without allegedly relevant portions, contends that this code provision is not applicable because the excerpts in question were not introduced as substantive evidence but merely as prior contradictory statements reflecting upon plaintiff's credibility.
>
> We pretermit discussion of whether the prior

statements, (concerning material facts as to which plaintiff claimed a complete loss of memory at the trial) were technically admissible as prior inconsistent statements to disprove the plaintiff's alleged present ignorance of those facts * * * We likewise pretermit discussion of whether or not the provisions of Article 1428 (4) apply not only to depositions introduced as substantive evidence but also to those used to show prior inconsistent statements, which traditionally are admissible only for the restricted purpose of impeaching the witness's credibility * * *, and not as substantive evidence of the facts contained in the statement.

We do not pass upon these contentions because we have concluded that excerpts from the plaintiff Broussard's discovery deposition were in fact offered and introduced as damaging admissions and not for impeachment purposes, even though the trial court had permitted the plaintiff Broussard to be questioned about them and had admitted them into evidence under the impression that they were being offered only to impeach the plaintiff's credibility. This is so for several reasons.

In the first place, State Farm relied on a substantive basis upon these excerpts which (out of context) completely exonerated Knott of any negligence, when State Farm filed a peremptory exception of no right and cause of action at the close of the plaintiff's case, which exception the trial court overruled. In the second place, at the time these excerpts were introduced over plaintiff's objections, no effort whatsoever was made to caution the jury that such statements of the party to the suit could not be considered as admissions or substantive evidence of themselves, but could be considered only insofar as they impeached the plaintiff's credibility * * * Finally, as in Louisiana criminal law, fairness demands that prior statements by a party himself, which the trial jury will in fact treat as admissions adverse to his interest, should not be per-

mitted in evidence under the guise they are introduced only to impeach credibility; they instead should ordinarily be admissible only with the same safeguards as if they were introduced as substantive evidence.

* * * * *

The crux of the plaintiff-appellant's present contention is his claim that he was entitled to introduce the entire discovery deposition, or at least the portions relevant to the excerpts introduced by the defendant, when the defendant State Farm introduced only a part of his discovery testimony. This contention is now based solely upon the provision of LSA-CCP Art. 1428 (4) that: "If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts."

* * * * *

The plaintiff is clearly correct in his contention * * * Furthermore, the plaintiff's counsel having specifically requested the reading of relevant portions which showed the meaning and context of the excerpts introduced by the defendant, the plaintiff did not waive his right to have those relevant portions introduced at the same time as defendant's offering * * *

Of course, under the rule, the plaintiff was also entitled to introduce, although not contemporaneously, the rest of the deposition insofar as not containing inadmissible evidence * * *

As suggested by the plaintiff, the defendant's introduction of isolated excerpts from the plaintiff's discovery deposition could and did present a distorted meaning of the plaintiff's discovery reply in the context of preceding questions and the surrounding testimony. For this reason, we think prejudicial error was committed in admitting isolated excerpts of the discovery deposition without requir-

ing the defendant simultaneously to introduce relevant immediately preceding or succeeding portions which showed the meaning in context of the excerpts introduced, as well as in refusing to permit the plaintiff subsequently, on redirect, to introduce the whole discovery deposition as authorized by LSA-CCP Art. 1428 (4), previously quoted. We are therefore unable to say that the jury verdict was not reached through manifest error.

The only defendant at trial was State Farm, which had originally asserted plaintiff's contributory negligence as a bar to his recovery, but then specifically withdrew this special plea, so that the only remaining issue was whether or not State Farm's insured, Knott, was guilty of any negligence causing or contributing to the accident. If the jury found him to have been guilty of such negligence, then State Farm was liable to plaintiff under the public liability portion of its policy. If the jury found Knott to have been free of actionable negligence, then the accident was due solely to the fault of Martin, and if the jury then found Martin to have been an "uninsured motorist", then plaintiff was entitled to recover against State Farm in accordance with the "uninsured motorist" provision of its policy.

It should be understood at this point that a deposition on oral examination of one Robert Smith, former owner of the truck involved in the accident, had been taken, and this was received in evidence in the trial. Smith had testified that when he sold the truck to Vernon it had been specifically understood between them that Smith's insurance coverage was not to continue, and that Vernon would have to obtain his own coverage. There was also introduced in evidence the testimony of Davenport, the local insurance salesman, to the effect that he had never told Vernon he was covered, that he had no authority to bind any insurer,

that no premium was ever paid for any coverage on the truck in question, and that he could have obtained insurance coverage only through a general agent in El Paso, this agent being the general agent for a number of insurance companies; he also testified that National Indemnity had issued coverage for the truck while it was owned by Smith, and that it later issued coverage by reason of a policy obtained by Vernon regarding the truck he acquired subsequent to the accident here in question.

(While it is true that other depositions taken prior to trial did contain statements that Davenport had told Vernon that he would be covered, none of these were introduced at the time of trial and do not form part of the record.)

When counsel for State Farm sought to interrogate plaintiff at trial concerning a verbal agreement of compromise, plaintiff objected first because of the provisions of Louisiana Civil Code Article 3071, heretofore mentioned, and the trial court responded:

> In the first place, I do not know whether the agreement was reduced to writing. And second place, I do not agree that it is irrelevant and immaterial for the reason that the plaintiff has brought this suit against persons whom he alleges to be joint tort-feasors and therefore solidarily liable. And the law is that if one or more solidary obligors contribute toward the common obligation, then the others are entitled to credit. Because our law does not permit a plaintiff to recover more than his actual damages.

Of course, the oral agreement did not constitute evidence that tended to show whether or not the persons were joint tort-feasors, and the ruling of the trial court to that

effect amounted to taking the issue away from the jury prematurely. Moreover, a tort-feasor solidarily liable is entitled to contribution to the extent of one-half of the total obligation, and evidence of the compromise agreement would have become admissible only after the jury had found in favor of plaintiff and against State Farm, and had fixed the amount of plaintiff's damages, and it would then have been a matter of law, determinable by the Court, whether a compromise payment should reduce the extent of State Farm's liability. *Harvey v. Travelers Insurance Co.*, 163 So. (2d) 915.

Despite timely objections, the trial court permitted defendant to inquire as to the verbal compromise agreement. In closing argument to the jury, defendant's counsel stated, as shown by the record:

> But Joe Franky Martin was asked if there was insurance on the truck, sure there is. Then the agent said he never told Burt Vernon he didn't have any insurance on it; but the fly in the ointment is, the company paid $15,000.00, agreed to pay to Antoine Broussard $15,000.00.

Defendant's counsel having argued to the jury that such agreement by National Indemnity would never have been made if that company had not insured Martin and the Vernon truck, plaintiff's counsel then requested the trial judge to instruct the jury as to the legal effects of a compromise agreement, but this the trial judge refused to do.

With respect to this, the Louisiana Court of Appeal stated:

> Pretermitting whether oral testimony that an agreement to compromise is admissible the same as

if the compromise had actually been reduced to writing, the trial court erred in this ruling. A compromise and discharge of one of two joint tort-feasors will restrict the claimant's recovery against the other tort-feasor to one-half, *Harvey v. Travelers Insurance Co.*, La. App. 3 Cir., 163 So. 2d 915, but the compromise itself is not admissible for the purpose of showing that the alleged co-tort-feasor was jointly negligent, while the amount of the compromise is relevant for no purpose.

* * * * *

We pretermit discussion of whether the present compromise may have been admissible here for a restricted purpose, such as in connection with plaintiff's alternative claim against State Farm under its "uninsured motorist" clause. Ordinarily the admission for an incorrect reason of evidence at the trial will be sustained on appeal, if proper on any ground * * * If so, nevertheless here the admission of evidence of the oral compromise, without restricting caution to the jury to completely disregard same as evidence that Martin was negligent or exclusively negligent, tended to be prejudicial; *Martello v. Hawley*, CA D.C., 300 F. 2d 721, 724 (1962), to the plaintiff in the jury's determination of his principal claim in tort against State Farm based upon his contention that Knott's, not Martin's, negligence was the sole proximate cause of the accident or at least a concurrent proximate cause. Such prejudice was not cured by the passing comment by the trial court in its instructions to the jury that compromise of a claim is not evidence of liability.

We conclude that because also of this prejudicial error the trial jury's verdict cannot be accorded the usual weight of jury findings in the absence of manifest error.

The prejudicial possibilities of admitting the fact and the amount of the compromise is illustrated by the reiteration in the argument of State Farm's

counsel that Broussard has already agreed to accept $15,000, "And now he says give me more!"

As a consequence of the seriously prejudicial errors referred to heretofore, the jury answered the special questions submitted to it, that Knott had not been guilty of any negligence which was a proximate cause of the accident, that Martin had been guilty of such negligence, that at the time of the collision there was public liability coverage on the truck operated by Martin, issued by National Indemnity Company, and that plaintiff had sustained damages in the amount of $25,000.00.

Having stated the Louisiana rule to be that the verdict of a jury will not be overturned on appeal on questions of fact, in the absence of "manifest error", the Louisiana Court of Appeal found such manifest error in rulings of law, but instead of remanding the case to be tried anew by the jury, thereby according to plaintiff his right to an opportunity to obtain a jury verdict that could be upset on appeal only for "manifest error", said appellate court, referring to plaintiff's contentions, stated, "We think these contentions are correct and accordingly have determined the merits independently of the jury verdict."

It is not necessary under the issues sought to be raised by the instant application to point out the various errors committed by said appellate court in its evaluation of the evidence, except to mention with the exclusion of the evidence relating to the verbal compromise, the record was then barren of anything from which any inference might have been drawn that National Indemnity was the insurer of the Vernon truck. To be sure, the appellate decision intimates otherwise, without referring to any such thing contained in the record, and then states:

* * * The plaintiff-appellant plainly cannot

> recover upon this alternative cause of action because it is shown by documents filed in the record shortly after trial that he received $15,000.00 from National Indemnity in full settlement of his claim against Martin, Martin's employer, and Martin's insurer arising out of Martin's alleged negligence. Under the terms of State Farm's "uninsured motorist" clause, this payment in excess of the coverage limits ($5,000.00) of the clause had the effect of extinguishing State Farm's liability under it.

Thus, the appellate court was referring to the written compromise which was not entered into until after the lower court judgment had been entered, so that its decision in this respect was based upon evidence just as inadmissible as that which the appellate court had held should have been rejected by the trial court.

Moreover, the decision in this respect is contrary to interpretations of other State and Federal Courts.

The Louisiana Financial Responsibility law differs from that of Virginia, for example, essentially to the extent that the minimum insurance coverage required is $5,000, whereas in Virginia it is $15,000, and the statutes of the two States regarding "uninsured motorists" coverage appear to be the same.

In *White v. Nationwide Mutual Insurance Co.*, 361 F. (2d) 785, plaintiff was in an automobile covered for $15,000 in the "uninsured motorists" provision, when injured in collision with a motorist carrying public liability coverage of $10,000. She obtained judgment in amount of $22,000, and the other insurer paid $10,000, after which she turned to her own insurer.

The Court held the other driver to have been an "un-

insured motorist", since his coverage was less than the statutory minimum.

Plaintiff's insurer then asserted that it owed only $5,000, as under the terms of its policy (as in the instant case), its "uninsured motorists" coverage of $15,000 was reduced by the amount plaintiff had recovered from the other driver's insurer.

The Court held such policy provision to be contrary to public policy and to the Virginia Financial Responsibility law, saying that payments from or in behalf of an uninsured motorist should be applied first to reduce the loss to the injured plaintiff, and not to reduce the loss to her uninsured motorists coverage carrier.

This is a holding preferable to that in the instant case, in which the issue of reduction of liability for the uninsured motorists coverage carrier was raised for the first time by the Louisiana Court of Appeal on its own initiative, and the litigants were not aware this was an issue, or permitted thereafter to obtain a hearing when the issue was raised by and decided by the appellate court.

REASONS FOR GRANTING RELIEF

Amendments Five and Fourteen of the United States Constitution guarantee all persons due process of law, and these provisions are applicable to State Court proceedings. Amendment Fourteen likewise grants to such persons equal justice.

Amendment Seven grants the right of jury trial in civil cases, and provides that the verdict of a jury shall not be re-examined on appeal, except in accordance with common law principles. Under the common law, a jury

verdict can be overturned on appeal only when there is no substantial evidence to support such verdict, and cannot be reversed merely because an appellate court may be of the opinion that such verdict is not supported by a preponderance of the evidence.

With respect to the applicability of Amendment Seven to State Court proceedings, petitioner herein specifically relies upon, and makes part hereof by reference, the contentions raised and the reasons urged by petitioners in *Sule v. Missouri Pacific*, Docket Number 174 of the October, 1965 term of this Court, *King v. Vico Insurance Co.*, *Heider v. Michigan Sugar Co.*, and *Sitton v. American Title Co. of Dallas*, these cases bearing Docket Numbers 338, 48 and 502, respectively, of the October, 1966, term.

However, the instant application presents additional questions.

Whether or not Amendment Seven applies to the States, once a State has granted trial by jury to its litigants in civil cases, it must grant jury trial in all of its traditional ramifications, and not merely an empty hull. *Turner v. Louisiana*, 379 U.S. 466, 85 S. Ct. 546.

The Louisiana appellate court decision here being questioned specifically states that its examination of the findings of the jury is contrary to common law principles. Consequently, if the second portion of Amendment Seven has been made applicable, by virtue of Amendment Fourteen, to State Court proceedings, plaintiff has been deprived of his constitutional rights.

Having granted to civil litigants the right of trial by jury, a Louisiana court cannot then destroy this right, but must accord jury trial in all of its traditional ramifications.

Trial by jury must necessarily include a determination by the jury, as sole judges of the facts, based upon correct instructions of the law, and it is a mockery for a Louisiana judge to instruct the jury that it is the sole judge of the facts, when appellate courts then engage constantly in second-guessing the jury and upsetting jury verdicts on questions of fact.

Furthermore, it is the general rule that a jury verdict cannot be reversed on appeal on questions of fact so long as there is any substantial evidence in the record to support such verdict. Even in Louisiana, as stated by the decision here being questioned, a jury verdict may be disturbed on appeal on questions of fact only for "manifest error". Thus, granting to a Louisiana plaintiff the right of trial by jury is to accord him the opportunity of coming into an appellate court with a favorable jury verdict which is not to be upset merely because the appellate tribunal may not agree with the jury's interpretation of facts, but which can be overturned only upon a finding of "manifest error". When an appellate court finds, as in the instant case, that a jury verdict adverse to plaintiff resulted directly from serious and prejudicial errors committed by the trial court, and when it then disregards the verdict of the jury for that reason, the appellate court must then remand the case to be tried anew before the jury, thus giving plaintiff the opportunity to arrive at a later appeal with a jury verdict in his favor, and for the appellate court then to make an independent evaluation of the evidence completely deprives plaintiff of the right of trial by jury.

Finally, the jurors are always instructed that, in determining the weight to be given to the testimony of a witness, they may take into account his demeanor. This is not possible for an appellate court, and since the litigant is

entitled to such demeanor evidence (*S. Buchsbaum and Company v. Federal Trade Commission*, 153 F. (2d) 85) independent determination of facts by an appellate court unconstitutionally deprive the litigant of the benefit of demeanor evidence.

CONCLUSION

The right of trial by jury in civil cases is recognized by the United States Constitution. It is also recognized by the Constitution and laws of Louisiana, but the Courts of that State scarcely give lip service to this proposition. Instead, they are constantly engaged in overturning jury verdicts on questions of fact, even though such verdicts are supported by substantial evidence. In doing so, they frequently claim to have discovered "manifest error" but frequently do not even bother to so assert (e.g., *Dore v. Hartford Accident & Indemnity Co.*, 180 So. (2d) 434).

The utter disdain with which the Louisiana courts view trial by jury, and the total lack of understanding of such courts of what is meant by trial by jury, is perhaps more clearly disclosed in the instant case than in any of predecessors.

Habeas corpus and trial by jury are the two foundations upon which all other constitutional guarantees rest. The Louisiana courts have completely destroyed civil trial by jury in that State, even though its constitution and laws recognize the rights, and it is clear from other applications for certiorari now before this Court that at least two other states have begun to adopt the same attitude. Unless this trend is checked by a clear and ringing pronouncement by this Court, civil trial by jury will soon be as dead in all states as it is in Louisiana.

Although a judge may be trained in the law, there is

no reason to conclude that he is better equipped than is a jury to determine facts or to administer justice. On the contrary, the constitutions and laws of the Federal government and of the various states universally recognize the contrary. But, even though a judge may be better qualified (and an electronic computer even more accurate than a judge) the constitutions and laws have reposed the power in juries.

Respectfully submitted,

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Lafayette, Louisiana.

By_____
J. MINOS SIMON

CERTIFICATE

STATE OF LOUISIANA
PARISH OF LAFAYETTE:

I, J. Minos Simon, counsel for petitioner and a member of the United States Supreme Court, hereby affirm under oath that a copy of the foregoing petition for writs of certiorari has been served on the parties hereto by mail, in a properly addressed envelope, postage prepaid as follows, to-wit:

Honorable Kenneth J. deBlanc, Clerk,
Louisiana Court of Appeals, Third Circuit,
Lake Charles, Louisiana.

Mr. Val J. Courville, Clerk,
Louisiana Supreme Court,
New Orleans, Louisiana.

McBride & Brewster,
Post Office Drawer 2700,
Lafayette, Louisiana.

J. MINOS SIMON

Sworn to and subscribed
before me this .....
day of November, 1966,
at Lafayette, Louisiana.

Notary Public

APPENDIX A

NO. 1690

COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA

ANTOINE BROUSSARD
Plaintiff-Appellant

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY
Defendant-Appellee

Appeal from the Sixteenth Judicial District Court, Parish of St. Martin; Honorable S. O. Landry, District Judge, Presiding.

Before TATE, HOOD, and CULPEPPER, Judges.

TATE, Judge.

The plaintiff Broussard was injured while riding as a passenger in an automobile. He brings suit for his personal injuries. This appeal concerns his claim against State Farm, the liability insurer of Knott, the driver of the plaintiff's vehicle. Based upon a jury verdict, the trial court dismissed the plaintiff's suit, and he appeals.

The chief issues of the appeal concern Knott's negligence, if any, and whether the trial court erred in the

admission of certain evidence or in the exclusion of an entire deposition or parts thereof.

1. Independent appellate review of facts.

The case was submitted to the trial jury upon special verdicts requiring a special written finding by the jury upon each issue of fact, LSA-CCP Art. 1811, as requested by the plaintiff. For the reasons to be stated below, we think that prejudicial error was committed in the exclusion and in the admission of certain evidence.

We are thus unable to accord the usual weight to the jury verdict. Such findings by the trier of fact are on review usually accepted in the absence of manifest error; this usual rule cannot apply where there is a reasonable possibility that the trial jury's finding was incorrectly based due to prejudicial rulings incorrectly excluding or admitting evidence by reason of which the jury might have reached a contrary verdict.

In common law states, upon finding prejudicial ruling as to evidence, the case would ordinarily be remanded for new trial. This is not the rule in Louisiana. Under our state constitution, ordinarily appellate review in civil cases is "on both the law and the facts". Louisiana Constitution of 1921, Article VII, Section 29. By reason of this constitutional mandate, a Louisiana appellate court will usually decide the appeal on its merits rather than remanding for new trial and new findings by the trier of fact, when the reviewing court is able to make an independent factual determination of the evidence as contained by the complete record of that sought to be introduced at the trial, including that ruled inadmissible by the trial court but nevertheless included in the record for purposes of appellate review, LSA-CCP Art. 1636.

After reviewing the entire record, including a deposition of the plaintiff taken prior to trial which was incorrectly excluded from the evidence submitted to the jury (see below), we have concluded that the preponderance of the evidence supports the jury's special verdicts and that the trial court's judgment should therefore be affirmed. Before discussing the evidentiary rulings which vitiated the weight of the trial jury's verdict, it will be appropriate to consider the factual contentions of the parties as to the merits.

The plaintiff Broussard was injured while riding in an automobile driven by his friend Knott. Knott's automobile was insured by State Farm, the appellee and the only defendant remaining in the case.

Broussard had initially also sued Martin, the driver of a truck with which Knott collided, as well as Martin's employer and the latter's liability insurer ("National Indemnity"). The latter initially denied coverage. However, on the day of the trial National Indemnity and the plaintiff Broussard compromised his claim for personal injuries.

Broussard's claim against State Farm, the remaining defendant, is based upon alternative contentions: (a) that State Farm is liable as the insurer of the negligence of Knott, its insured; (b) that, alternatively, State Farm is liable under its "uninsured motorists" coverage, on the contention that Martin's truck was not validly insured since National Indemnity's policy insuring such truck had lapsed.

2. Knott's negligence.

Knott collided with Martin's large truck and semi-trailer when it turned left across his path. The accident

occurred at 1:30 A.M. At the time, visibility was impaired by fog, the extent of impairment being in dispute. The accident took place in a rural area on a main two-lane highway.

The evidence reflects without serious question that Martin, the driver of the left-turning truck, was negligent in turning left across Knott's path. Martin's lookout was directed to his left in order to discover the driveway into a service station which he was approaching, and he failed to make adequate lookout for oncoming traffic before turning leftward across the opposing traffic's lane of the highway in which Knott was approaching.

The plaintiff-appellant contends that Knott's negligence was a concurring proximate cause of the accident. Knott was allegedly negligent in driving at a speed of 40-45 mph when his visibility was impaired by fog.

As to the extent of impairment, Knott himself testified that the fog had become pretty steady from about a mile before the accident, as a result of which he had slowed to 40-45 mph. He testified that he could see the road ahead pretty clearly for about 100-200 feet. Before this distance, however, Knott at first saw only the two headlights of the oncoming truck. He kept his eyes on them until the truck came closer. He stated he did not see any turn-blinker lights lit on the truck.

According to Knott, when the vehicles were within 75-100 feet of one another, the truck turned suddenly left across his path. He immediately applied his brakes, leaving skidmarks of 90 feet, but nevertheless struck the truck towards its rear, near the center of the roadway. At the time, the rear of the 50-foot long truck-trailer still protruded about 4-5 feet into its former lane of travel, the

front having turned across the other lane of the 24-foot highway and into the driveway.

The truck driver Martin testified as to a thicker fog and consequently much less visibility, as well as to a less sudden left turn. He also testified that he had flicked on his turn-blinker lights long before he turned, which Knott's testimony in effect denied.

The investigating state trooper estimated visibility at the time and place of the accident as 300 feet or somewhat less. He found that the rear of the 50-foot truck-trailer still protruded across Knott's lane and was still across at least a third of the other (south) lane from which it had turned left (north), and that it was struck two feet over (south of) the center line by Knott's automobile which had made 90 feet of brake skidmarks before the collision. As we interpret his testimony, the truck driver informed him of his speed at the time, which he believed to not be "over fifteen or ten or fifteen miles an hour" (although the trooper did not have his notes at the time). Tr. 353. No objection was made to this last testimony.

The plaintiff Broussard professed to have lost his memory at the time of the trial in November, 1965. However, at a discovery deposition several months earlier (February, 1965), he had testified fairly clearly as to the accident of October 11, 1963, some eighteen months earlier. This entire discovery deposition should have been admitted (see below); when it is considered as a whole, despite portions which indicate inadequate lookout by Knott, Broussard's testimony in the main supports Knott's version of the accident rather than Martin's. For instance, he noticed only the two headlights of the truck, Tr. 275, no blinking turn lights, when almost instantaneous with the

accident his attention was called to oncoming traffic by Knott's exclamation to him to watch out, Tr. 289. Furthermore, as he saw these headlights they were still coming from his left, or in other words just turning suddenly across Knott's path. Tr. 296-297. As a whole, the discovery deposition supports Knott's version that the truck turned suddenly across Knott's path, following which he immediately applied his brakes and cautioned Broussard as to the impending accident.

We think that the preponderance of the evidence, including the physical facts of the collision, supports a finding that with Knott approaching at 40-45 mph the truck-driver Martin suddenly and without warning turned left across Knott's path at a speed of 10 mph or so, and at a time when Knott could not reasonably have avoided the accident.

When a motorist's visibility ahead is impaired, it is true, he should reduce his rate of speed to such extent and keep his automobile under such control as to reduce to a minimum the possibility of accident from collision with objects ahead. *Demarest v. Travelers Ins. Co.*, 234 La. 1048, 102 So. 2d 451; *Seal v. Core*, La. App. 1 Cir., 175 So. 2d 676; Annotation, Automobiles—Atmospheric Conditions, 42 ALR 2d 13. Nevertheless, the degree to which the motorist must reduce his speed depends upon the particular circumstances, including the factual degree to which his visibility is obscured.

At any event, under our construction of the evidence any excessive speed by Knott had no causal relationship with the accident resulting when without previous warning the truck turned suddenly left across Knott's path at a time when Knott, at his speed of 40-45 mph, was unable reasonably to avoid the ensuing collision.

In order for the negligence of a party to be a "legal" or "proximate" cause of injury sustained by another, it must not only be a cause-in-fact of the injuries, i.e., a substantial factor in producing them. Additionally, the risk and harm resulting in accidental injury must be within the scope of protection afforded by the duty to others breached by such negligence. *Dixie Drive It Yourself New Orleans Co. v. American Beverage Co.*, 242 La. 471, 137 So. 2d 298, Noted 23 La. L. Rev. 142 (1962), 23 La. L. Rev. 286-290 (1963); *Dartez v. City of Sulphur*, La. App. 3 Cir., 179 So. 2d 482, and authorities therein cited.

Any duty of Knott to proceed at a slower speed because of the fog was, insofar as here pertinent, designed to prevent accident through his running into objects in his path because of his inability to see them sooner because of the fog, *Lewis v. Quebedeaux*, La. App. 3 Cir., 134 So. 2d 93, or else to prevent an accident resulting from collision with those entitled to expect a slower approach of oncoming traffic who might therefore cross rashly into his path because of obscured perception of his approach, *Demarest v. Travelers Ins. Co.*, 234 La. 1048, 102 So. 2d 451.

Under the facts found by us, both Knott and Martin could see the other's vehicle at a distance of 200-300 feet, and both should and could have perceived the oncoming headlights when the vehicles were yet more distant. Had he looked, the truck driver Martin could have seen clearly the oncoming Knott vehicle, which was just 100-150 feet away at the time Martin commenced his turn.

Under these facts, any negligence of Knott was not a contributory cause of the accident. Prior to the sudden turn by Martin, Knott was under no duty to slacken his own speed or to take precautions to avoid colliding with

the oncoming truck which he observed at the time in its own lane. A motorist on the right side of the road can reasonably assume that opposing traffic observed by him will not suddenly turn into his lane and across his path. *Launey v. Traders and General Insurance Company*, La. App. 3 Cir., 169 So. 2d 757; *Myles v. Creuzot*, La. App. 4 Cir., 166 So. 2d 532; 2 Blashfield (1951 permanent edition), Sec. 919, page 92, et seq.; see also *Patterson v. St. Paul Mercury Ins. Co.*, La. App. 3 Cir., 173 So. 2d 224 (dicta), and cases cited therein. A motorist proceeding forwarding despite visibility obscured by fog or mist is not necessarily negligent if he collides with a vehicle which unexpectedly turns left across his path, *Samples v. Strait*, La. App. 1 Cir., 36 So. 2d 856, cf., *McLaney v. Turner*, 267 Ala. 588, 104 So. 2d 315 (1958), or with an oncoming vehicle which unexpectedly encroaches into his own lane of the highway, *Felder v. Eagle Star Insurance Co.*, La. App. 1 Cir., 79 So. 2d 90, *Thomas v. Stewart*, La. App. 1 Cir., 29 So. 2d 604, *Middleton v. Scaife*, La. App. 2 Cir., 190 So. 829; see Annotation, Automobiles — Atmospheric Conditions, 42 ALR 2d 13, especially Sections 13, 14, 75(a).

3. The plaintiff's alternative claim: State Farm's liability under its "uninsured motorists" coverage.

Alternatively, if Knott is held free of negligence (and State Farm therefore exculpated in its capacity as his liability insurer), the plaintiff contends that State Farm is nevertheless liable for the negligence of Martin, the truck driver, under State Farm's "uninsured motorists" clause. In this regard, the plaintiff contends that there was no effective liability coverage of Martin's truck at the time of the accident. The claim upon this cause of action was likewise tried before and submitted to the jury.

Succinctly, the "uninsured motorists" clause in Knott's policy with State Farm provided protection, inter alia, to persons injured while occupying the insured automobile who are legally entitled to recover damages from the owners or operators of an **uninsured** motor vehicle. In effect, insofar as those insured by State Farm's policy, the clause provides liability coverage insuring an uninsured motorist's liability up to the clause's policy limits of $5,000 per person.

The alternative cause of action is based upon the plaintiff's allegations that previous coverage upon Martin's truck had expired due to a change of ownership a few days before the accident.

In response to a special interrogatory requiring a special verdict, the trial jury expressly found that Martin's truck was validly insured at the time of the accident.

This special verdict of the trier of fact is supported by the preponderance of the evidence. The testimony of the local insurance agent, including conversations by the latter with the general agent of the previous insurer ("National Indemnity") in the presence of the new owner of the truck, indicate that National Indemnity's previous liability coverage for the former owner of the truck was validly continued by oral binder in favor of the new owner —at the least, that National Indemnity is estopped from contending the contrary after the accident, because of the prior actions by its general and local agents indicating assurance of continued coverage. Appleman's Insurance Law and Practice, Sections 7192 (Vol. 12, 1943), 9202 (Vol. 16, 1944); Couch on Insurance 2d, Sections 14:32 (Vol. 1, 1959), 26:189-191 (Vol. 4, 1960).

Additionally, however, the plaintiff-appellant plainly cannot recover upon this alternative cause of action be-

cause it is shown by documents filed in the record shortly after trial that he received $15,000 from National Indemnity in full settlement of his claim against Martin, Martin's employer, and Martin's insurer arising out of Martin's alleged negligence. Under the terms of State Farm's "uninsured motorists" clause, this payment in excess of the coverage limits ($5000 per person) of the clause had the effect of extinguishing State Farm's liability under it.[1]

4. Contention that incorrect evidentiary rulings produced manifest error of trial jury verdict.

The plaintiff-appellant forcefully contends that we can accord no weight to the jury verdict determining the close factual questions of whether Knott's speed was negligent under the circumstances and degree of the obscured visibility here present. Counsel contends that the verdict is in error as a result of two prejudicially erroneous evidentiary rulings by the trial court:

(1) The trial court's failure to permit the plaintiff Broussard to introduce all of a discovery deposition taken from him, after the defendant State Farm had questioned him as to isolated excerpts contained therein;

(2) The trial court's overruling the plaintiff's counsel's objection to interrogation of the plaintiff requiring his compromise of his claim against Martin, the alleged joint tortfeasor, and requiring him to testify as to the same.

For the reasons to be set forth below, we think these

Footnote 1. See clause provision: "Any amount payable under the terms of this part because of bodily injury sustained in an accident by a person who is an insured under this part, shall be reduced by all sums paid on account of such bodily injury by or on behalf of the owner or operator of the uninsured automobile * * *."

contentions are correct and accordingly have determined the merits independently of the jury verdict.

5. Allegedly erroneous refusal to permit the plaintiff Broussard to introduce all of the discovery depositions taken from him.

The trial was in November, 1965. In February, 1965, the defendant State Farm had taken Broussard's oral deposition for discovery purposes.

At the trial Broussard professed a complete loss of memory as to events surrounding the 1963 accident. Thereupon, State Farm's counsel attempted to refresh his memory or to confront him with his prior contradictory statement in the deposition taken eight months earlier. Counsel asked Broussard if he remembered certain questions and answers given by him on his discovery deposition several months earlier. Upon Broussard's negative response, these earlier statements were introduced into evidence.

The plaintiff-appellant's complaint is that the excerpts from his discovery deposition introduced at the trial were out of context and that he was entitled to have introduced also those parts relevant to the excerpts admitted, so as to show the latter's correct meaning according to their context. The plaintiff-appellant also contends that he is entitled to have his entire discovery deposition introduced as a result of the defendant-appellee's introduction of part of it. In both of these contentions, the plaintiff Broussard relies upon LSA-CCP Art. 1428, especially 1428(4), which we will quote in our later discussion below.

Article 1428(4) requires a party to introduce relevantly connected parts of the deposition along with any excerpts offered, and it also permits any other party to

offer other parts or all of the deposition. State Farm, which introduced the excerpts from the plaintiff's testimony without allegedly relevant portions, contends that this code provision is not applicable because the excerpts in question were not introduced as substantive evidence but merely as prior contradictory statements reflecting upon the plaintiff's credibility.

We pretermit discussion of whether the prior statements (concerning material facts as to which the plaintiff claimed a complete loss of memory at the trial) were technically admissible as prior inconsistent statements to disprove the plaintiff's alleged present ignorance of those facts. See: 3 Wigmore on Evidence, Section 1043 (3d ed. 1952); 5 Wigmore, Section 1415; but see: 3 Wigmore, Section 1040 and McCormick on Evidence (1954), Section 34, also *State v. Guidry*, 160 La. 655, 107 So. 479. We likewise pretermit discussion of whether or not the provisions of Article 1428(4) apply not only to depositions introduced as substantive evidence but also to those used to show prior inconsistent statements, which traditionally are admissible only for the restricted purpose of impeaching the witness's credibility (3 Wigmore, Section 1018, McCormick, Section 390), and not as substantive evidence of the facts contained in the statement.

We do not pass upon these contentions because we have concluded that excerpts from the plaintiff Broussard's discovery depositions were in fact offered and introduced as damaging admissions and not for impeachment purposes, even though the trial court had permitted the plaintiff Broussard to be questioned about them and had admitted them into evidence under the impression that they were being offered only to impeach the plaintiff's credibility. This is so for several reasons.

In the first place, State Farm relied on a substantive basis upon these excerpts which (out of context) completely exonerated Knott of any negligence, when State Farm filed a peremptory exception of no right and cause of action at the close of the plaintiff's case (Tr. 172), which exception the trial court overruled. In the second place, at the time these excerpts were introduced over the plaintiff's objections, no effort whatsoever was made to caution the jury that such statements of the party to the suit could not be considered as admissions or substantive evidence of themselves, but could be considered only insofar as they impeached the plaintiff's credibility. See: *State v. Paul*, 203 La. 1033, 14 So. 2d 826, and *State v. Reed*, 49 La. Ann. 704, 21 So. 732, as explained by *State v. Reed*, 206 La. 143, 19 So. 28, cf., *State v. Rocco*, 222 La. 177, 62 So. 2d 265. Finally, as in Louisiana criminal law, fairness demands that prior statements by a party himself, which the trial jury will in fact treat as admissions adverse to his interest, should not be permitted in evidence under the guise they are introduced only to impeach credibility; they instead should ordinarily be admissible only with the same safeguards as if they were introduced as substantive evidence. *State v. Hayes*, 162 La. 310, 110 So. 486.

The plaintiff's prior deposition testimony was clearly admissible. LSA-CCP Art. 1428 expressly provides, in fact, that " * * * so far as admissible under the rules of evidence, * * * (2) the deposition of a party * * * may be used *by an adverse party* for any purpose. (Italics ours.) The deposition statements of a *party* may be offered by an opponent as an *admission*. 5 Wigmore, Section 1416; also, 4 Wigmore, Section 1048. Under the very similar Federal Rule provision, FRCP 26(2), the deposition of a party is broadly admissible for substantive evidence as an admission when offered by his opponent, *Community Counselling*

Service, Inc. v. Reilly, 317 F. 2d 239 (CA 4, 1963), *Cleary v. Indiana Beach, Inc.*, 275 F. 2d 543 (CA 7, 1960), although there are expressions that the court has discretion to require counsel to specify the portions deemed relevant and to limit the offer accordingly, *Pursche v. Atlas Scraper and Engineering Co.*, 300 F. 2d 467, 488 (CA 9, 1961), or to exclude those portions unnecessarily repetitious in relation to the witness's testimony on the stand, *Merchants Motor Freight v. Downing*, 227 F. 2d 247 (CA 8, 1955).

The crux of the plaintiff-appellant's present contention is his claim that he was entitled to introduce the entire discovery deposition, or at least the portions relevant to the excerpts introduced by the defendant, when the defendant State Farm introduced only a part of his discovery testimony. This contention is now based solely upon the provision of LSA-CCP Art. 1428(4) that: "If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts."

LSA-CCP Art. 1428(4) is taken from the identically worded provision of the Federal Rules of Civil Procedure, Rule 26(d)(4). In discussing that Federal Rule 26(d)(4), an authoritative commentator states: "This provision guards against the possibility of giving the court a distorted picture of the deponent's testimony by introducing only part of it. The clause authorizing introductions of any other parts is, of course, subject to the objections to admissibility as evidence * * *." 3 Barron and Holtzoff, Federal Practice and Procedure, Section 654 at p. 166. The federal jurisprudence offers persuasive guidance in the interpretation of Louisiana Code of Civil Procedure articles based on the federal rules. *Kay v. Carter*, 243 La. 1095, 150 So. 2d 27.

The plaintiff is clearly correct in his contention. When the defendant introduced excerpts from the deposition, under the rule's provision (when a party introduces part of a deposition, the other party "may *require* him to introduce all of it which is relevant to the party introduced"), the plaintiff was entitled to require the contemporaneous introduction of the relevant contextual preceding or succeeding statements. *Westinghouse Electric Corp. v. Wray Equipment Corp.*, 286 F. 2d 491 (CA 1, 1961). Furthermore, the plaintiff's counsel having specifically requested the reading of relevant portions which showed the meaning in context of the excerpts introduced by the defendant, see Tr. 398, 401, 403, 404-406, the plaintiff did not waive his right to have those relevant portions introduced at the same time as the defendant's offering, cf., *Andrews v. Olin Mathieson Chemical Corp.*, 334 F. 2d 422, 427-28 (CA 8, 1964).[2]

Of course, under the rule, the plaintiff was also entitled to introduce, although not contemporaneously, the *rest* of the deposition insofar as not containing inadmissible evidence. *Interchemical Corp. v. Watson*, 145 F. Supp. 179 (CA, D.C., 1956), affirmed, 251 F. 2d 390 (CA, D.C., 1957).

As suggested by the plaintiff, the defendant's introduction of isolated excerpts from the plaintiff's discovery deposition could and did present a distorted meaning of the plaintiff's discovery reply in the context of preceding questions and the surrounding testimony. For this reason,

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Footnote 2. See also generally, 7 Wigmore, Sections 2113, 2115, and 4 Wigmore, Section 1059. Even if the discovery deposition had been introduced by one party merely to impeach as a prior inconsistent statement, generally speaking the other party has the privilege of offering (not necessarily contemporaneously) the relevant reminder. 7 Wigmore, Sections 2113, 2115. See also: *Camps v. New York City Transit Authority*, 261 F. 2d 320 (CA 2, 1958); *Cafasso v. Pennsylvania R. Co.*, 169 F. 2d 451 (CA 3, 1948); *Affronti v. United States*, 145 F. 2d 3 (CA 8, 1944).

we think prejudicial error was committed in admitting isolated excerpts of the discovery deposition without requiring the defendant simultaneously to introduce relevant immediately preceding or succeeding portions which showed the meaning in context of the excerpts introduced, as well as in refusing to permit the plaintiff subsequently, on redirect, to introduce the whole discovery deposition as authorized by LSA-CCP Art. 1428(4), previously quoted. We are therefore unable to say that the jury verdict was not reached through manifest error.

6. Improper evidentiary ruling requiring the plaintiff to testify as to his compromise of his claim against other parties.

Over objection by the plaintiff's counsel, the trial court required the plaintiff to answer questions by State Farm's counsel that he had agreed to accept $15,000 from National Indemnity, the insurer of the truck, and to dismiss his suit against it and the truck driver Martin and his employer. Tr. 432, 436, 437-8.

Counsel for the plaintiff objected to this testimony as immaterial and irrelevant and additionally because, if admissible, any agreement of compromise introduced had to be in writing, LSA-Civil Code Article 3071. The trial court found the compromise material and relevant because joint tort-feasors are entitled to credit. Tr. 432.

Pretermitting whether oral testimony that an agreement to compromise is admissible the same as if the compromise had actually been reduced to writing, the trial court erred in this ruling. A compromise and discharge of one of two joint tort-feasors will restrict the claimant's recovery against the other tort-feasor to one-half, *Harvey v. Travelers Insurance Co.*, La. App. 3 Cir., 163 So. 2d

915, but the compromise itself is not admissible for the purpose of showing that the alleged co-tort-feasor was jointly negligent, while the amount of the compromise is relevant for no purpose.

This is so because an earlier compromise or offer to compromise a disputed claim is not admissible to establish liability upon the claim, if objected to by a compromiser or offeror who is a party to the suit in which the compromise or offer is sought to be introduced into evidence. McCormick on Evidence, Section 251 (1954); 4 Wigmore, Sections 1061, 1062; 31 CJS "Evidence", Sections 285-290. The basic reason for this privilege of preventing admissibility is the policy danger of discouraging compromises, favored by law, if they can be used adversely to the compromiser in other proceedings. McCormick, Section 251 at p. 541; Annotation, Negligence—Payment of Similar Claims, 20 ALR 2d 304; *Brown v. Pacific Electric Ry. Co.*, 79 Cal. App. 2d 613; 180 P. 2d 424 (1947) (collecting decisions).

However, although generally inadmissible to prove liability, compromises may be admissible for other purposes. McCormick at p. 542; 31 CJS at Sections 286, 287, and 290; *Belanger v. The Employers Mutual Liability Co.*, La. App. 1 Cir., 159 So. 2d 500 (of probative value as to veracity); cf., *Pizzollatto v. Employers Mutual Liab. Ins. Co.*, La. App. 4 Cir., 144 So. 2d 630.

We pretermit discussion of whether the present compromise may have been admissible here for a restricted purpose, such as in connection with the plaintiff's alternative claim against State Farm under its "uninsured motorists" clause. Ordinarily the admission for an incorrect reason of evidence at the trial will be sustained on appeal, if proper on any ground. 5 CJS "Appeal and

Error" 1463(3). If so, nevertheless here the admission of evidence of the oral compromise, without restricting caution to the jury to completely disregard same as evidence that Martin was negligent or exclusively negligent, tended to be prejudicial, *Martello v. Hawley*, CA D.C., 300 F. 2d 721, 724 (1962), to the plaintiff in the jury's determination of his principal claim in tort against State Farm based upon his contention that Knott's, not Martin's negligence was the sole proximate cause of the accident or at least a concurrent proximate cause. Such prejudice was not cured by the passing comment by the trial court in its instructions to the jury that compromise of a claim is not evidence of liability, Tr. 500.

We conclude that because also of this prejuicial error the trial jury's verdict cannot be accorded the usual weight of jury findings in the absence of manifest error.

The prejudicial possibilities of admitting the fact and the amount of the compromise is illustrated by the reiteration in the argument of State Farm's counsel that Broussard has already agreed to accept $15,000, "And now he says give me more!" Tr. 515.

7. Other contentions of the plaintiff-appellant.

Since we have determined that the trial jury's verdict should be disregarded because of the prejudicial exclusion of the plaintiff's discovery deposition and because of the prejudicial admission of evidence of the compromise, it is unnecessary for us to discuss other allegations of error in rulings or instructions to the jury, which without discussion we will simply state we do not find to be well founded.

8. Claim on appeal for $260.60 under the medical payments clause.

Finally, the plaintiff-appellant suggests that, at the very least, he is entitled to judgment for unpaid medical expenses in the amount of $260.60 by virtue of the medical payments clause of State Farm's policy. Under this clause, the defendant insurer had agreed to pay medical expenses up to $2,000 incurred as a result of accidental injury while occupying the insured automobile, irrespective of any negligence of the driver.

The plaintiff's petition had included a payment for total medical expenses of $3,500, but the thrust of the allegations were that they were sought in tort rather than based upon any contractual obligation represented by the medical payments clause.

Such recovery under the medical payments clause might be properly allowable in this suit, with the liberal interpretation of pleadings required by this state's procedural law. However, we believe that this payment for recovery under the medical payments clause should be nonsuited under the facts of this case.

Neither by his petition nor by his requested instructions did the plaintiff request recognition of his right to recovery under the medical payments clause (as distinguished from recovery by reason of tort liability insured by the defendant). The proof does establish medical expenses of $260.60 paid by the plaintiff, Tr. 434, 436, but the evidence also indicates that State Farm may have paid some or all of the plaintiff's remaining medical expenses, Tr. 430-432, 436. Not until this appeal was recovery of these medical expenses sought from State Farm upon the medical payments clause rather than in tort. Thus the

evidence inconclusively establishes the plaintiff's right to recover under the medical payments clause this amount in addition to medical expenses previously paid by State Farm (with its maximum limit of $2,000).

We think it appropriate, therefore, that the plaintiff's claim under the medical payments clause be nonsuited. We do expressly reserve him his right to recover by further suit any unpaid liability to him of State Farm under its medical payments clause which had not been paid at the time of the trial below.

Decree.

For the foregoing reasons, the trial court judgment dismissing the plaintiff Broussard's claim against the defendant State Farm is affirmed at his cost. The plaintiff's right is expressly reserved to recover any medical expenses owed to him at the time of trial by reason of the medical payments clause of State Farm's policy.

AFFIRMED.

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APPENDIX B

LOUISIANA CIVIL CODE

ARTICLE 3071:

A transaction or compromise is an agreement between two or more persons, who, for preventing or putting an end to a lawsuit, adjust their differences by mutual consent, in the manner which they agree on, and which every one of them prefers to the hope of gaining, balanced by the danger of losing.

This contract must be reduced into writing.

LOUISIANA CODE OF CIVIL PROCEDURE

ARTICLE 1731:

Except as limited by Article 1733, the right of trial by jury is recognized.

The nature and amount of the principal demand shall determine whether any issue in the principal or incidental demand is triable by jury.

ARTICLE 1733:

A trial by jury shall not be available in:

(1) A suit demanding less than one thousand dollars exclusive of interest and costs;

(2) A suit on an unconditional obligation to pay a specific sum of money, unless the defense thereto is forgery, fraud, error, want or failure of consideration;

(3) A summary, executory, probate, partition, man-

damus, habeas corpus, quo warranto, injunction, concursus, workmen's compensation, emancipation, tutorship, interdiction, curatorship, legitimacy, filiation, separation from bed and board, annulment of marriage, or divorce proceeding;

(4) A proceeding to review an action by an administrative or municipal body; and

(5) All cases where a jury trial is specifically denied by law.

ARTICLE 1734:

In his demand a party may specify the issues which he wishes to be tried by jury; otherwise he shall be considered to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party, within ten days after service of the demand or such lesser time as the court may order, may demand trial by jury of any or all of the other issues in the action.

ARTICLE 1735:

The trial of all issues for which jury trial has been requested shall be by jury unless the parties stipulate that the jury trial shall be as to certain issues only, or unless the right to trial by jury as to certain issues does not exist, but in all cases there shall be but one trial.

ARTICLE 1761:

In cases to be tried by jury, twelve jurors summoned in accordance with law shall be chosen by lot to try the case. The method of calling and drawing by lot shall be at the discretion of the court. The parties may stipulate for a lesser number of jurors to try the case; or that if one

or more of the jurors dies or becomes disqualified the remaining jurors shall try the case.

ARTICLE 1768:

When the jury has been accepted by all parties, the jurors shall be sworn to try the case in a just and impartial manner, to the best of their judgment, and to render a verdict according to the law and the evidence. When the jury has retired, the jurors shall select a foreman to preside over them and sign the verdict which they may render.

ARTICLE 1791:

After the trial of the case and the presentation of all the evidence and arguments, the court shall charge the jury in accordance with law. This charge shall be in writing or recorded in the same manner as testimony taken in the case.

ARTICLE 1792:

In his charge to the jury the judge shall instruct the jurors on the law applicable to the cause submitted to them, but he shall not recapitulate or comment upon the evidence so as to exercise any influence upon their decision as to the facts.

ARTICLE 1793:

At the close of the evidence or at an earlier time during the trial as the court reasonably directs, a party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury.

A party may not assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

ARTICLE 1795:

In order to render any verdict, nine of the jurors must concur therein. The parties may stipulate, however, that the concurrence of a stated majority of the jurors shall be sufficient for a verdict, and must do so when they have stipulated for a trial by a lesser number in accordance with Article 1761.

ARTICLE 1811:

The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written forms of the several special findings which might properly be made under the pleadings and evidence; or may use any other appropriate method of submitting the issues and requiring the written findings thereon. The court shall give to the jury such explanation and instruction concerning the matter submitted as may be necessary to enable the jury to make its findings upon each issue. If the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue omitted unless, before the jury retires, he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be presumed to have made a finding in accord with the judgment on the special verdict.

ARTICLE 1813:

If the trial court is of the opinion that the verdict is so excessive or inadequate that a new trial should be granted for that reason only, it may indicate to the party or his attorney within what time he may enter a remittitur or additur. This remittitur or additur is to be entered only with the consent of the plaintiff or the defendant as the case may be, as an alternative to a new trial, and is to be entered only if the amount of the excess or inadequacy of the verdict or judgment can be separately and fairly ascertained. If a remittitur or additur is entered, then the court shall reform the jury verdict or judgment in accordance therewith.

ARTICLE 1814:

A new trial shall be granted if it be proved that the jury was bribed or has behaved improperly so that impartial justice has not been done.